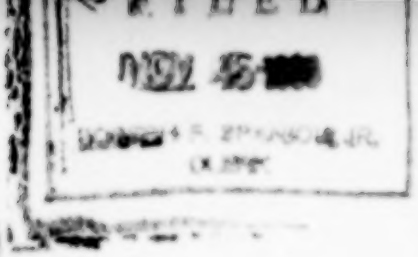

No. 89-1845

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ALI BOURESLAN,

Petitioner,

v.

ARABIAN AMERICAN OIL COMPANY, *et al.*

Respondents.

BRIEF OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE POSITION OF PETITIONER

Robert Plotkin, Esquire
Counsel of Record
Michelle D. Bernard, Esquire
Jacqueline F. Brown, Esquire
Conan Louis, Esquire
William Scott Shackelford, Esquire
WASHINGTON, PERITO & DUBUC
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-4000
Attorneys for *Amicus Curiae*
THE INTERNATIONAL HUMAN RIGHTS LAW GROUP

OF COUNSEL

Steven M. Schneebaum, Esquire
Janelle M. Diller, Esquire
THE INTERNATIONAL HUMAN RIGHTS LAW GROUP
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 232-8500

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INTEREST OF AMICUS

The International Human Rights Law Group ("Law Group") is a nonprofit legal organization which seeks to promote the observance of international human rights norms. Founded in 1978, the Law Group provides legal assistance and information in the field of international human rights law and has consultative status with the United Nations Economic and Social Council (ECOSOC). With the assistance of attorneys who contribute their services to the Law Group, the Law Group's expertise is offered on a pro bono basis to individuals and groups concerned with respect for human rights.

In United States courts, the Law Group has participated as amicus in many cases urging United States compliance with international human rights norms. Over the past several years, the International Human Rights Law Group has also developed a special interest in states' compliance with international norms prohibiting discrimination against ethnic and racial groups. The issues briefed have concerned the use of human rights standards which may guide the interpretation of the United States constitution to comply with international norms.

The International Human Rights Law Group, interested in securing United States compliance with international human rights norms, urges reversal of the decisions below. In reversing the lower

court, the United States will reaffirm its commitment to the universally recognized principle of nondiscrimination in employment and to human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

SUMMARY OF THE ARGUMENT

The case presently before the Court represents the intersection of two areas of law that have long been the subject of American interest and advocacy: the bolstering of human rights and the aspiration for equality in the workplace. Antipathy to discrimination has become a matter of international consensus. Indeed, protection from employment discrimination is included in numerous international treaties setting forth the bases of human rights. At issue here is

whether the United States can aid in the international effort to eradicate discrimination from the workplace by allowing its domestic protection to apply extraterritorially when both an employer and employee are United States citizens.

The first issue to examine is whether the extraterritorial application of Title VII is authorized as a matter of United States law. There must be an affirmative showing that Congress intended Title VII to be applied beyond United States territory. The Language of the statute evidences Congress's intent that Title VII have an extraterritorial effect by exempting aliens employed by a United States employer abroad from Title VII's protection. This exemption allows a negative inference to be drawn that

Congress intended to include non-aliens, or United States citizens, within its protection. This conclusion is supported by an examination of the legislative history of Title VII, the decisions of the bodies vested with the duty to enforce Title VII, and by a recent amendment to the Age Discrimination in Employment Act by which Congress affirmatively created extraterritorial jurisdiction in the belief, that by doing so, that amendment would be brought into line with Title VII.

The second question presented is whether the United States possesses the capability to assert jurisdiction over a matter that occurred outside of its territory. Both parties to this matter are United States nationals. Petitioner is a naturalized citizen. Respondent

Aramco Services Company [hereinafter ASC] and respondent Arabian American Oil Company [hereinafter ARAMCO] were United States nationals at the time of the conduct in question in this case. Petitioner worked for ARAMCO, a United States corporation, until he was fired in June 1984. Thus, unlike a situation where American law might be forced upon unwilling foreign parties, at the time the alleged discriminatory conduct occurred, respondents were both United States nationals and subject to United States law under the nationality principle of jurisdiction.

In addition to authorization by Congress and a jurisdictional basis for such extraterritorial application in this case, the remaining inquiry is whether

exercise of jurisdiction is reasonable. The interest of the United States in protecting its citizens from discrimination, particularly from employers who are also United States citizens, is overwhelming. Likewise, United States citizens have a legitimate expectation of being protected by Title VII when working abroad for a United States employer and in avoiding a result that would allow such employers to discriminate on the basis of a transfer outside of the United States. Moreover, the reasons favoring an application of extraterritorial jurisdiction are not outweighed by arguments to the contrary. Saudi Arabia is a party to an international treaty that prohibits a broader range of discriminatory practices than Title VII and explicitly prohibits

the practices identified in Title VII. In addition, nothing in Saudi domestic law presents a conflict with an extraterritorial application of Title VII. Given the strong reasons for protecting United States expatriates from discrimination by United States employers abroad and the lack of conflict occasioned by doing so, an extraterritorial application of Title VII in this instance can only be reasonable.

ARGUMENT

This case requires the court to determine whether Title VII of the Civil Rights Act of 1964 extends protection against discriminatory employment practices by American corporations to American citizens abroad.

Title VII has become an extremely effective piece of civil rights legislation passed by Congress in this century. The history of discrimination in our culture is a social reality which cannot be ignored. Moreover, America's history demonstrates that laws prohibiting discrimination by United States nationals against American citizens both domestically and abroad are indeed necessary.

The question of America's commitment to enforcing nondiscrimination in employment on behalf of American citizens working abroad is of critical importance. Congress's intent for Title VII's protection to reach such citizens is borne out through established sources of

statutory interpretation and is cogently argued in Judge King's dissenting opinion below. In addition, the norms of international law as affirmed in international agreements, customary law, and general principles of law common to the world's major legal systems prohibit governmental support of discrimination in employment. For the reasons argued below, this Court should reverse the decision of the Fifth Circuit below and remand this case with instructions to reinstate the action for further proceedings below.

I. CONGRESS INTENDED TITLE VII's PROHIBITION AGAINST DISCRIMINATORY CONDUCT TO APPLY EXTRATERRITORIALLY

Congress's intent to ensure equality and nondiscrimination domestically and abroad through Title VII is evident through application of established rules

of statutory construction. As demonstrated below, in enacting Title VII, Congress intended that all Americans are entitled to be free from the intolerable barrier of discrimination in employment based on race, color, religion, sex or national origin. In addition, a comparison of Title VII with other statutes supports a finding of extraterritorial application under the circumstances of this case.

A. Established Rules of Statutory Interpretation Demonstrate Expressed Congressional Intent to Apply Title VII Extraterritorially

Congress has the power to enact legislation with extraterritorial effect when regulating the conduct of United States nationals. See, e.g., Steele v. Bulova Watch Co., Inc., 344 U.S. 280,

282-83 (1952) (trademark infringement by corporation of United States nationality); Blackmer v. United States, 284 U.S. 421, 443 (1932) (imposition of fines on United States citizen abroad for failure to obey subpoenas in criminal case). However, in determining whether Congress intended to exercise this power when it enacted Title VII, one must presume that the acts of Congress are intended to apply within the territorial boundaries of the United States unless there is a clear showing of congressional intent to the contrary. See Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); Steele, 344 U.S. at 282-83. There need not be a direct and explicit statement of extraterritorial application

to overcome this presumption.[1] In addition, Congress's intent is to be construed consistently with international law. Murray v. Schooner Charming Betsey, 6 U.S. (2 Cranch) 64, 118 (1804) (a statute may not be construed to violate international law unless Congress has clearly stated its intent to the do so).

Here, the language and legislative history of Title VII rebut the presumption that the Act was intended to apply only within the territory of the United States. Moreover, the extraterritorial application of Title VII in this case is

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1/ The presumption that statutes do not apply extraterritorially is simply a means of ascertaining unexpressed congressional intent not to extend jurisdiction extraterritorially. Foley Bros., 336 U.S. at 285.

consistent with international law as demonstrated in Part II, infra.

1. Statutory Language and Legislative History

The language of Title VII provides firm ground for concluding Congress intended the statute to be applied extraterritorially. Although the definitional sections, particularly those for the terms "commerce" and "industry affecting commerce," exhibit an intent to cover at least certain types of enterprises involved in foreign commerce, the alien exemption clause of the statute particularly demonstrates Congress's intent that Title VII reach United States nationals abroad, both individuals and corporations. Section 702 of the statute provides that Title VII "shall not apply to an employer with respect to the

employment of aliens outside any State . . ." 42 U.S.C. § 2000e-1 (1989). The language of that clause exempts the employment of aliens abroad by employers as defined by Title VII but does not exempt the employment of United States nationals abroad or the employment of aliens within the boundaries of the United States. The application of the statute to the employment of aliens within the United States is already provided for in the definition of "employee," which covers "an individual employed by an employer," 42 U.S.C. § 2000e(f). Accordingly, the most logical positive inference from the clause is that, in expressly excluding only aliens from extraterritorial application, United States nationals abroad are

covered.[2/] Any other interpretation of the statute would render the exemption superfluous and is thus a result to be avoided. See Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (An interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress should be avoided).

The legislative history of the alien exemption clause reveals Congress's intention that Title VII's protection extend extraterritorially to United States

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2/ In Espinoza v. Farah Mfg. Co. Inc., 414 U.S. 86 (1973), this Court analyzed the alien exemption clause and drew a negative inference from the exemption clause that aliens in the United States are covered. The Espinoza Court recognized its result as derived from a negative inference from the exemption in § 702 . Id. at 95.

nationals employed by American corporations abroad. For example, a committee report explained that the purpose of the alien exemption clause was to eliminate conflicts of law that may arise when an American enterprise employed alien citizens in a foreign nation. H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963). See also Civil Rights Hearings on H.R. 7152 Before the House Committee on the Judiciary, 88th Cong., 1st Sess. 2303 (1963). If Title VII was not intended to apply extraterritorially, Congress would not have been concerned with conflicts of law "which might otherwise exist." Id.

Other courts have relied on the evidence of Congressional intent in the alien exemption clause in finding an application of Title VII to U.S. nationals

affected by discriminatory conduct of U.S. corporations abroad. E.g., Akgun v. Boeing Co., et. al., No. C89-1319D, slip op. at 2 (W.D. Wash. June 7, 1990); Seville v. Martin Marietta Corp., 638 F. Supp. 590, 592 (D. Md. 1986); Lavrov v. NCR Corp., 600 F. Supp. 923, 931-932 & n. 5 (S.D. Ohio 1984); Bryant v. International Schools Serv., 502 F. Supp. 472, 482 (D. N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982); Love v. Pullman Co., 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978) ("Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state . . . .").

(2) Administrative Decisions

The agency charged with administering Title VII, the Equal Employment Opportunity Commission, [hereinafter EEOC], has consistently maintained that Title VII does apply to protect American citizens working abroad from employment discrimination by American Employers. See, e.g., Decision No. 90-1, Empl. Prac. Dec. (CCH) ¶6875 (April 10, 1990) (". . . [T]he EEOC's position, which is recognized by the courts, is that Title VII protects American citizens employed by American companies abroad"); Age Discrimination and Overseas Americans, 1983: Hearing Before The Subcomm. on Aging of the Sen. Comm. On Labor & Human Resources, 98th Cong., 1st Sess. 5 (1983) (During hearings on the proposed amendments of the Age Discrimination in

Employment Act, the EEOC's Chairman testified that Title VII had been construed to apply to discrimination outside of the United States); Policy Statement No. N-915.033, EEOC Compl. Man. (CCH) ¶2164 (Sept. 2, 1988). The Justice Department has also interpreted Title VII to apply to discrimination by United States nationals abroad. In 1975, former Assistant Attorney General Scalia testified before Congress that the alien exemption clause implies that Title VII applies abroad. Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and

Urban Affairs, 94th Cong., 1st Sess. 165 (1975).[3/]

B. A Comparison of Title VII with other Statutes Supports a Finding of Extraterritorial Application

A comparison of Title VII with other statutes supports a finding of extraterritorial application in this case. Although Title VII regulates relationships between employers and employees, it is a civil rights statute

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3/ Consistent with the tenet that § 703 of Title VII applies extraterritorially to private discriminatory conduct, § 717 of Title VII, 42 U.S.C. §2000e-16, applies extraterritorially to the discriminatory conduct of federal agencies. See, e.g., Brown v. Marsh, 777 F.2d 8 (D.C. Cir. 1985) (applying § 717(c) of Title VII extraterritorially to cover discriminatory conduct of the United States Army).

and thus distinct from labor management relations statutes which have been held not to apply extraterritorially.

1. The 1984 Amendment of the Age Discrimination in Employment Act Supports A Similar Extraterritorial Application of Title VII

The recent amendment of the Age Discrimination in Employment Act [hereinafter ADEA] to allow for extraterritorial jurisdiction supports a similar application of Title VII. In 1984, after several circuit courts had inappropriately held that the ADEA did not apply extraterritorially, Congress amended the statute's definition of employee to include United States nationals employed by an employer in a foreign country. 29 U.S.C. § 630(f) (1989).

In amending the ADEA, then Senator Grassley, sponsor of the ADEA amendments, stated that "the substantive prohibitions of the [ADEA] were worded nearly exactly as those in Title VII, which at least two district courts have held does apply abroad," and argued that this proposed amendment would "clear [ ] up an anomaly" that "Congress never intended." 129 Cong. Rec. 34,499 (1983).

If Title VII is now construed so as to not afford protection to American citizens employed abroad from private discriminatory conduct, the only type of prohibited discrimination will be based on age with no protection for the more traditionally protected categories of race, color, sex, religion or national origin. Clearly such a result is

unwarranted. Cf. Diller, Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise, 73 Geo. L.J. 1465, 1481-1482 (1985) (". . . [The] constitutional status [of Title VII] may support greater legislative concern with private discrimination of the sort prohibited by Title VII. . . . [D]iscrimination on the basis of age has not reached constitutional stature and does not merit the same level of concern") [hereinafter Diller]. The fact that Congress has not amended Title VII to address this policy evidences its belief that Title VII was intended to, and therefore does, apply to protect American citizens employed by American employers on foreign soil.

2. **Although Title VII Regulates the Relationship Between Employer and Employee, Title VII is a Civil Rights Statute and is Therefore Distinct From Labor Management Relations Statutes**

Although Title VII is a statute which regulates the relationship between employer and employee, it is distinct from statutes regulating labor relations which have been denied extraterritorial application even where both parties to the suit are United States nationals as in this case.[4/] Unlike the labor

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4/ See e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 22 (1963). (The Supreme Court held that Congress had not demonstrated the requisite clear intent in the Labor Management Relations Act and that therefore, the protections of that Act did not extend extraterritorially); Foley Bros., 336 U.S. at 286 n.2. (The Supreme Court held that the jurisdiction of the Eight Hour Law did not apply extraterritorially).

management relations statutes, extraterritorial application of Title VII would grant the United States jurisdiction to protect fundamental, inherently individual rights of American laborers from infringement by American employers. See generally Diller, supra, at 1480. ("A primary difference between Title VII and the employment-related statutes that have been denied extraterritorial application is Title VII's explicit exclusion of aliens employed abroad. [footnote omitted]. The restricted statutes contain no such exclusion and thus present no formal bar to extending United States jurisdiction from the United States plaintiff in the case before the court to foreseeable alien plaintiffs claiming United States statutory protections over their employment conditions

abroad . . . . [footnote omitted]. Unlike these statutes regulating collective interests in labor-management relations, Title VII exhibits legislative concern for the protection of individual interests").

II. THE EXTRATERRITORIAL APPLICATION OF TITLE VII IN THIS CASE IS CONSISTENT WITH ESTABLISHED PRINCIPLES OF INTERNATIONAL LAW AND REACHES DISCRIMINATORY EMPLOYMENT PRACTICES BY AMERICAN CORPORATIONS AGAINST AMERICAN CITIZENS ABROAD

The extraterritorial application of Title VII in this case is consistent with established principles of international law because both plaintiff and defendant are United States nationals and because application of the law extraterritorally is not unreasonable. Under international law, "the jurisdiction of a state depends

on the interest that state, in view of its nature and purposes, may reasonably have in exercising the particular jurisdiction asserted and on the need to reconcile that interest with the interests of other states in exercising jurisdiction." L. Henkin, R. Pugh, O. Schachter & H. Smit, International Law 823 (2d ed. 1987) [hereinafter International Law]. Moreover, the "nature and significance of the interests of a state in exercising jurisdiction depend on the relation of the transaction, occurrence, or event, and of the person to be affected, to the state's proper concerns." Id.

The Restatement (Third) of Foreign Relations Law of the United States identifies the circumstances which justify a state's exercise of extraterritorial

jurisdiction. In analyzing whether discriminatory conduct under Title VII may be applied to United States nationals abroad, the jurisdictional question involves the ability of a state to prescribe, that is, to make its law applicable to the activities, relations or status of persons, or the interest of persons in things. Restatement (Third) of Foreign Relations Law of the United States § 401(a) (1987) [hereinafter Third Restatement]. The Third Restatement provides a two-pronged test to determine the legitimacy of exercising extraterritorial jurisdiction. First, there must be a jurisdictional basis to prescribe. Id. at § 402. Second, the assertion of jurisdiction must not be unreasonable. Id. at § 403(1). As shown below, in this case, there is both a

jurisdictional basis for the United States to prescribe the activities of its nationals abroad, and the assertion of that jurisdiction is not unreasonable.

A. Under the Nationality Principle, Title VII Applies to the Conduct in this Case Because Respondents and Petitioner are United States Nationals

The jurisdictional basis for applying Title VII extraterritorially to the conduct in this case is found in the nationality principle of jurisdiction. The Third Restatement provides that "a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory. . . ." Id. at § 402(2). This basis of jurisdiction, known as the

nationality principle, applies to juridical persons such as corporations. The nationality of a corporation is that of the state under whose law it is organized. Id. at § 402 comment e.

The nationality principle recognizes a state's significant interest in exercising jurisdiction over the conduct of any national, whether an individual or corporation, and in protecting its nationals. International Law at 823. Consequently, an application of the nationality principle in this case requires a determination whether the parties are United States nationals. If the alleged discriminatory conduct was committed abroad by an employer-corporation of United States nationality against an employee who is a

United States citizen, then the bases for application of the nationality principle allow prescription of such conduct by the United States.

The record in this case firmly establishes that petitioner is a United States citizen and that both the Arabian American Oil Company and its subsidiary, ARAMCO Services Company were United States corporations at the time the alleged discriminatory conduct occurred. Petitioner worked for ARAMCO, a United States corporation, until he was fired in June, 1984.[5/] Unlike a situation where

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5/ Although the respondent ASC is now a wholly-owned subsidiary of the Saudi Arabian Oil Company, a Saudi Arabian company, ASC was a Delaware corporation with its principle place

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American law might be forced upon unwilling foreign parties, respondents ARAMCO and ASC were both United States nationals at the time the alleged discriminatory conduct occurred. As such, they are subject to United States law under the nationality principle.

In sum, international law permits the assertion of the nationality principle to hold that Title VII applies to the discriminatory conduct of individuals and corporations of United States

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5/ [Footnote Continued From Previous Page]

of business in Houston, Texas at the time it hired petitioner in 1979. The petitioner applied for employment with ASC's parent company, respondent Arabian American Oil Company, a Delaware corporation with its principle place of business in Dhahran, Saudi Arabia.

nationality.[6/] That the prohibited conduct occurred in a foreign country does not destroy jurisdiction but requires only that such exercise be reasonable.

6/ The nationality principle has been the subject of previous Title VII litigation involving affiliated foreign entities of American corporations. See, e.g., Bryant v. International School Serv., Inc., 502 F. Supp. 472, 482 (D. N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982) (in applying Title VII to the discriminatory conduct of a branch office of a United States corporation in Iran, the district court relied on numerous Supreme Court cases applying the nationality principle to assert various United States statutes extraterritorially). See also Third Restatement § 414 (detailing the exercise of jurisdiction with respect to activities of foreign branches and subsidiaries).

B. **Respondent is Properly Under United States Jurisdiction Because the Exercise of Extraterritorial Jurisdiction is not Unreasonable**

It is a universally recognized principle of international law that a country may govern the conduct of its citizens in foreign countries when the exercise of such jurisdiction is reasonable. See, e.g., Third Restatement § 403 comment a (the principle that an exercise of jurisdiction on the basis of nationality "is nonetheless unlawful if it is unreasonable is established United States law, and has emerged as a principle of international law as well"). The Third Restatement provides that a determination whether an exercise of jurisdiction is unreasonable is "determined by evaluating all relevant factors." Third Restatement

at § 403(2). Those factors consist of the following:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Id.

An application of the above factors to this case demonstrates that application of Title VII here would not be unreasonable and thus the exercise of jurisdiction in this case is justified under international law.

(1) The United States Has a Strong and Legitimate Interest in Protecting Citizens Employed Abroad by American Corporations from Discrimination in Employment

A factor in considering whether the exercise of exterritorial jurisdiction is reasonable is "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect." Third Restatement at §403(2)(b). An examination of this factor reveals the reasonableness of the application of United States law abroad in this case because both respondents and Boureslan are United States nationals.

Although ARAMCO's principal place of business is in Saudi Arabia, as noted supra, it is incorporated in the United States and the person to be protected is an American citizen. Protecting a U.S. national abroad based on nationality is a factor which weighs heavily in favor of applying United States law. Note, Equal Employment Opportunity For Americans Abroad, 62 N.Y.U. L. Rev. 1288, 1320 (1987).

As the dissent in the opinion below noted, employment discrimination by American employers against American citizens, wherever practiced, has devastating effects both on the economy of this country and on the dignity and livelihoods of Americans who have come to rely on civil rights legislation.

Boureslan, 892 F.2d at 1282 (King, J., dissenting). The number of Americans employed abroad is greater now than at any other time in United States history and is continually increasing. In those corporations in which successful performance in overseas assignments is essential or desirable for promotion, the effects of discrimination abroad will be reflected in employment decisions and career paths within the United States. For all of the above reasons, the strong connections of the United States to the parties and activity in this case bear out the reasonableness of applying Title VII under these circumstances.

(2) The Regulation of Discrimination Under Title VII Involves Fundamental Human Rights and is Important to the United States

In accordance with the Third Restatement, § 403(2), the exercise of extraterritorial jurisdiction in this case is not unreasonable because the regulation of employment discrimination involves fundamental and generally-accepted human rights and is important to the United States. Indeed, the claim to equality, enforced under Title VII has been termed "the starting point of all other liberties." H. Lauterpacht, International Bill of Rights of Man, 115 (1945), quoted in Ramcharan, "Equality and Justice," in, The International Bill of Rights 247 (L. Henkin ed. 1981) [hereinafter Ramcharan]. The inherent dignity and equal and inalienable rights of "all members of the

human family" are recognized in the opening lines of the Universal Declaration of Human Rights, which was passed unanimously by the United Nations General Assembly on Dec. 10, 1948, as a "common standard of achievement for all peoples and all nations as "the foundation of freedom, justice, and peace in the world."[7/] Id. at 247. The Universal

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7/ The principles of equality and nondiscrimination in the international law of human rights were eloquently described in an address by the Head of the Federal Political Department of Switzerland at the opening of the World Conference to Combat Racism and Racial Discrimination on August 14, 1978:

> Of all human rights, the right to equality is one of the most important. It is linked to the concepts of liberty and justice, and is manifested through the observance of two fundamental

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Declaration of Human Rights, also declares that:

> Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status . . .

Universal Declaration of Human Rights, G.A. Res. 217, 3 U.N. GAOR (No. 1) at 71,

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> and complementary principles of international law. The first of these principles, that "all human beings are born free and equal in dignity and rights," appears in the 1948 Universal Declaration of Human Rights; the second, the principle of nondiscrimination, has been solemnly reaffirmed in Article 1 of the Charter of the United Nations.

See Report of the World Conference to Combat Racism and Racial Discrimination, U.N. Doc. A/CONF. 92/40 Annex 1C (1979).

U.N. Doc. A/811 (1949). Moreover, the principles of equality and nondiscrimination have been widely acknowledged as forming part of international customary law.[8/]

8/ Ramcharan, supra, at 247, 249 (1981). In fact, some have even argued that the ideals of international rights are jus cogens and are thus preemptory norms binding on all as superior law. Articles 2(1), 3, and 26 of the International Covenant on Civil and Political Rights set forth five related principles: (1) the principle of equal enjoyment of rights; (2) the general principle of equality and the corollary principle of equality between men and women; (3) the principle of equality before the law and equality before the courts; (4) the principle of equal protection of the law; and (5) the principle of nondiscrimination. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 52, U.N. DOC. A/6316 (1976). The principles of equality and nondiscrimination were intended to be in effect the same

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There is a growing international consensus against the type of discrimination prohibited by Title VII.[9] Consequently, international attention has increasingly focused on enforcing fair employment requirements. That no person shall be

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8/ [Footnote Continued From Previous Page]

principles as those contained in the United Nations Charter, the Universal Declaration, and the International Covenant on Economic, Social and Cultural Rights.

9/ The international community has adopted many conventions deploring discrimination including the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 21 GAOR Supp. (No. 14) at 47, U.N. DOC. A/6014 (1969); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. DOC. A/34/46 (1979); and the International Labour Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (1958).

deprived of the right to employment based on race, color, sex, religion, or national origin has finally received global recognition. Street, Fair Employment Practices and International Commerce, 34 National Bar Association Magazine (1990) [hereinafter Street]. All the member states of the United Nations, furthermore, have pledged to promote and encourage respect for human rights and for fundamental freedoms for all without discrimination. Id.

The International Covenant on Economic, Social, and Cultural Rights[10/] reiterates the principle of nondiscrimination in employment and demonstrates the international community's

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10/ G.A. Res. 220, 21 GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1976).

desire to address the need for uniform employment rights for all working individuals. Street, supra, at 34.

Article 2(2) of the Covenant provides that:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion . . . [or] national or social origin.

Id. at Art. 2. Furthermore, Article 6 recognizes "the right to work" as an economic freedom. Id. at Art. 6. Such provisions are best understood to mean that individuals have a right to employment without regard to race, color, creed, sex, religion, language, or national origin. Street, supra, at 34.

Regional enforcement of such norms is also in practice. For example, in

light of the move in 1992 toward a collective trade agreement, an increasing number of legal proceedings are occurring in the European Economic Community to enforce fair employment requirements against employers. See Id., at 18.

In 1944, the International Labour Organization [hereinafter ILO] established the principle of non-discrimination in employment. Street, International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices, 31 Howard L.J. 497, 499 n.5 (1988). In 1958, the ILO declared the protection of employees against inequalities based on race, color, sex, religion, political opinion, national extraction or social origin in the International Labour Organization

Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (1958). The United States is presently examining American labor and employment laws relating to Convention No. 111. Saudi Arabia and at least 108 nation members of the ILO have already ratified Convention (No. 111).

The importance to the United States of protecting its citizens against discrimination is in accord with the growing international consensus against discrimination based on race, religion, sex, and national origin. The number of Americans employed by American firms overseas is substantial. Currently, it is estimated that over 2000 United States firms operate more than 21,000 foreign

subsidiaries in at least 121 foreign nations. Introduction to 1 World Trade Academy Press, Directory of American Firms Operating in Foreign Countries (10th ed. 1984). The State Department has estimated that almost 2.2 million American citizens reside abroad. See The World Almanac and Book of Facts: 1990 555 (1989). The United States has demonstrated its commitment to eliminating discrimination by enacting and enforcing numerous laws to that end.[11/] See Alaska Packers Ass'n

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11/ In the employment area, Congress has demonstrated such commitment by passing Title VII and other legislation such as the 1977 Amendments to the Export Administration Act. Note, Equal Employment Opportunity For Americans Abroad, supra, at 1321-1322 (citing 50 U.S.C. app. § 2407(a)(1)(B) (1982) (prohibiting discrimination against any United States person in support of boycott against country friendly to United States)).

v. Industrial Accident Comm'n, 294 U.S. 532, 543 (1935) ("States, of course, have 'as great an interest in affording adequate protection' to individuals who are employed by companies incorporated there and work outside the state as to employees within the state").

(3) Americans Have a Legitimate Expectation That They Will Not Lose the Protection of Title VII When They Accept a Position with the Foreign Office of a U.S. Firm

Another factor examined in determining reasonableness is "the existence of justified expectations that might be protected or hurt by the regulation." Third Restatement at § 403(2)(d). As an American citizen, petitioner justifiably expected that the anti-discrimination protections he was

afforded while in the United States would also apply while working for an American company in a foreign country. Such expectations are especially strong for United States citizens when only the mere location of employment has changed but neither their qualifications nor job description has been varied. Given the involvement of both an American citizen and an American company, it was reasonable for Boureslan to justifiably expect Title VII to apply and to protect him from discrimination.

(4) The Potential for Conflicts with Foreign Law are Negligible

A final factor in determining the reasonableness of extraterritorial application of a statute is "the likelihood of conflict with regulation by another state." Third Restatement at

§403(2)(h). The definition of conflict is quite narrow. Comment e states that § 403(3) "applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible." This definition excludes the situation in which a person can comply with the laws of both states. Third Restatement § 403 comment e. In this case, application of Title VII comports with Saudi Arabia's domestic law and international obligations.

The Saudi Arabian law applying to contractual relationships between employers and employees is set forth in the Saudi Arabian Labour and Workmen Regulations of 1969, Royal Decree No.

M/21: Labour Code (15 November 1969) [hereinafter Saudi Labour Code]. The Saudi Labour Code prohibits discrimination in general terms. For example, Article 91(a) obliges an employer to "treat his employees with respect and refrain from any word or act that may affect their dignity or religion." Article 22 declares practices inconsistent with "the freedom to work" to be illegal. The Saudi Labour Code also provides procedural remedies for employees "dismissed for no valid reason." Saudi Labour Code Art. 74 (describing factors to be considered in assessing damage), Art. 75 (delineating a terminated employee's procedural remedies); see also Lerrick & Mian at 42 ("the employer's act of termination [under the Saudi Labour Code] may not be arbitrary, nor imputable to a

discriminatory, retaliatory, or in general bad faith purpose"). Moreover, although Saudi Arabia has enacted employment laws, Saudi legislation does not specifically state that those laws apply to the employment activity between foreign citizens and foreign companies on Saudi soil. Given this lack of specificity in the Saudi employment laws, it is impossible to ascertain "to what extent a foreign state would enforce its own laws to regulate the employment relationship between a United States corporation and employees who are United States citizens, or whether it would make its administrative and judicial procedures available to a United States employee seeking to bring a grievance against a United States employer." Boureslan v. Aramco, Arabian American Oil Co. & Aramco

Serv. Co., 857 F.2d 1014, 1028 (5th Cir.) reh'g granted, 863 F.2d 8 (1988), aff'd, 892 F.2d 1271 (1990), (King, J., dissenting), cert. granted, EEOC v. Arabian American Oil Co., ____ U.S. ____, 111 S. Ct. 40 (1990). In sum, since Saudi employment laws may not apply to discriminatory practices of American employers against American employees, the likelihood of conflict with the Saudi Labour Code appears minimal.

Title VII also comports with Saudi Arabia's international obligations. Saudi Arabia is a signatory to the International Labour Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (1958) [hereinafter ILO (No. 111)] which is a multilateral treaty conceived under

the authority of the International Labour Organization. In Article 1, the ILO (No. 111) defines discrimination as "any distinction, exclusion or preference made on basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." Id. at Art. 1(1)(a). As a member state to the Convention, Saudi Arabia thereby seeks to protect its citizens from the forms of discrimination prohibited verbatim by Title VII as well as a broader range of discriminatory practices set forth in ILO (No. 111). In this instance, the extraterritorial application of Title VII mirrors the antidiscriminatory purpose of the Convention. Not only does Title VII

comport with Saudi Arabia's domestic laws and international obligations, but the "likelihood of conflict" between Saudi law and Title VII is negligible.

Given the narrow definition of a conflict, it is highly unlikely that application of Title VII in this case will cause an actual conflict between United States law and Saudi law. An actual conflict does not arise merely because one state has already exercised jurisdiction with respect to a given person or activity or simply because one state has "a strong p licy to permit or encourage an activity which the other state wishes to prohibit." Third Restatement at § 403 comment d. Indeed, Title VII itself provides for minimizing potential conflicts with foreign laws through the

bona fide occupational qualification [hereinafter BFOQ] exception. 42 U.S.C. § 2000e-2(e) (1981). See, e.g., Kern v. Dynaelectron, 577 F. Supp. 1196 (N.D. Tex. 1983), aff'd mem., 746 F.2d 810 (5th Cir. 1984) (employer's requirement of Moslem pilots to fly helicopters into Mecca constituted BFOQ when Saudi law imposed death penalty on non-Moslems entering Mecca).

Furthermore, as aptly noted in the dissent below, 857 F.2d at 1031 (King, J., dissenting), the application of Title VII to discriminatory practices by American employers against American employees would not be an affront to the concept of state sovereignty. Comment d of §403 of the Third Restatement states that concurrent jurisdiction may be reasonable, "for

example, when one state exercises jurisdiction on the basis of territoriality and the other on the basis of nationality; or when one state exercises jurisdiction over activity in its territory and the other on the basis of the effect of that activity in its territory . . ." In the present case, the reasonableness of applying Title VII extraterritorially is supported by the availability of concurrent jurisdiction and the United States' intention to apply this provision only to its own nationals. Id.

CONCLUSION

The right to equality and nondiscrimination is widely recognized within the international community.[12/] As previously discussed, the changing world economy and increasing global interdependence has resulted in unifying initiatives for international employment requirements which play a significant role in focusing international efforts on the common sense principle of fair play and equal employment opportunity for all. Street, supra, at 34. Thus, global awareness of the right to employment free from discrimination has become a part of international jurisprudence. Id.

12/ For instance, equality and nondiscrimination constitute the dominant single theme of the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 52, U.N. DOC A/6316 (1976). Ramcharan, at 247.

The United States adheres to the principles of equality and nondiscrimination and enacted Title VII to implement a national goal of the "highest priority." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

Congress's intent to enforce Title VII's prohibitions to the conduct of United States corporations affecting United States nationals abroad is evident from the language of the statute, legislative history, administrative decisions, and a comparison of Title VII with other United States statutes

Now, for the first time in Title VII's 26-year history, a federal trial and appellate court have held that discrimination inflicted on American

citizens by American employers does not violate federal civil rights legislation if it transpires outside the United States. Contrary to such a conclusion, expressed Congressional intent and international jurisdictional principles support extraterritorial application of Title VII. In reversing the decisions below, this Court will further Congress's attempt to ensure that all Americans, both inside and outside the United States, are free from suffering the intolerable consequences of discrimination.

For the foregoing reasons, the decisions below should be reversed.

Respectfully submitted,

Robert Plotkin, Esquire
Counsel of Record

Michelle D. Bernard, Esquire
Jacqueline F. Brown, Esquire
Conan Louis, Esquire
William S. Shackelford, Esquire
WASHINGTON, PERITO & DUBUC
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-4000

Attorneys for Amicus Curiae
THE INTERNATIONAL HUMAN RIGHTS
LAW GROUP

OF COUNSEL

Steven M. Schneebaum, Esquire
Janelle M. Diller, Esquire
THE INTERNATIONAL HUMAN RIGHTS
LAW GROUP
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 232-8500

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APPENDIX

APPENDIX A

INTERNATIONAL LABOR ORGANIZATION CONVENTION (NO. 111) CONCERNING DISCRIMINATION IN RESPECT OF EMPLOYMENT AND OCCUPATION 362 U.N.T.S. 31 (1958)

Article 1

1. For the purpose of this Convention the term "discrimination" includes--

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

3. For the purpose of this Convention the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes by methods appropriate to national conditions and practice--

(a) to seek the co-operation of employers' and workers' organizations and other appropriate bodies in promoting the acceptance and observance of this policy;

(b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

(c) to repeal any statutory provisions modify any administrative instructions or practices which are inconsistent with the policy;

(d) to pursue the policy in respect of employment under the direct control of a national authority;

(e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;

(f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

APPENDIX B

The Age Discrimination in Employment Act of 1967 provides in pertinent part:

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,
(B) common management,
(C) centralized control of labor relations, and
(D) common ownership of financial control, of the employer and the corporation.

29 U.S.C. § 623(h) (1989).

APPENDIX C

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-2(a) (Title VII, § 703(a)).

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-1 (Title VII, §702)

APPENDIX D

Saudi Arabian Labour and Workmen Regulations of 1969, Royal Decree No. M/21: Labour Code (15 November 1969)

Article 22

It is illegal for any employee or employer to do any act that may constitute an abuse of any of the provisions of this Code, or of the decisions and rules issued in execution of the provisions hereof. It is also illegal for any employee or employer to do any act that may bring pressure to bear on the freedom of the other or on the freedom of other employees or employers with the object of obtaining any interest or supporting any point of view and which is inconsistent with the freedom of work and the jurisdiction of the authorities concerned with the settlement of disputes.

Any offender shall be liable to the penalties provided for in this Code and in the general regulations.

Article 74

If the contract is cancelled for no valid reason, the party prejudiced by such cancellation shall be entitled to compensate to be assessed by the competent board. Provided that such assessment shall take into account actual and contingent material and moral prejudice suffered by such party. In the case of the employee such assessment shall take into account the nature of the work, the period of service, the employee's age, the pay he was receiving, his family responsibilities, the extent to which his income from his new job is lower than the income from his old job, the degree of arbitrariness of the decision to dismiss him, the extent to which this decision affects his reputation, and any other conditions and concomitant circumstances in accordance with the rules of equity and current generally accepted practice.

Article 75

An employee who is dismissed for no valid reason may apply for a stay of execution of such dismissal. The application shall be submitted to the director of the labour office of the area in which his workplace is located, within a period not exceeding fifteen days from the date on which the employer delivers the dismissal notice to the employee or notifies him of such dismissal by registered letter or by any other means proving receipt. The director of the appropriate labour office shall, immediately upon submission of the

application to him, take the necessary action to settle the dispute amicably. If a settlement is not reached the director shall, within one week from the date of submission of the application, refer the same to the appropriate board of the area in which the workplace is located, together with a memorandum, in five copies, containing a summary of the dispute and the arguments of both parties, accompanied by the labour office's comments and recommendations for the settlement of the dispute.

The chairman of the board shall, within three days from the date of referral of the application to the board, fix a hearing for the examination of the stay of execution, within two weeks from the date of such referral. The employee and the employer shall be given notice of the time and place of the hearing, and both the employee and the employer shall be summoned to attend such hearing.

A copy of the memorandum from the labour office shall be attached to each notice, which shall be served by registered letter or by any other means proving receipt.

The board shall expeditiously decide on the application for stay of execution within two weeks from the date of the first hearing. Its decision in this respect shall be final. The decision shall fix a date for a hearing to examine the basic issue within the week following the issuance of the decision. If the board orders a stay of execution, the

employer shall simultaneously be ordered to pay to the employee forthwith a sum equivalent to his pay from the date of his dismissal.

The employer may, within one week at the most from the date of issuance of the decision ordering the stay of execution, reinstate the employee in his post and pay him his wage arrears, whereupon the dispute shall be considered settled and such settlement shall be recorded in a report to be drawn up before the chairman of the board, signed by the employer and the employee and approved by the chairman of the board. This report shall have the force of a decision issued by the board. If the said period expires and no settlement is reached, the board shall decide on the basic issue within a period not exceeding fifteen days from the date of issuance of the decision ordering the stay of execution.

If the board finds that the employee's dismissal was without valid justification, it may order his reinstatement with payment of his wage arrears, or it may order payment of his statutory entitlements as well as any compensation due him for damages he has sustained. The onus of proof that the dismissal was for a valid reason shall lie with the employer. The board's decision in this respect shall be considered a decision of first instance.

Dismissal shall be regarded as having no valid reason if it is established that it followed the employee's demand for legitimate rights

due to him by the employer and no other valid reason for termination is established. In such case, the employer shall be ordered to reinstate the employee, pay his wages from the date of his dismissal to the date of his reinstatement, and to consider his services as continuous.

The employee's dismissal shall also be regarded as being without valid justification of such dismissal was caused by the employee's refusal to comply with an order transferring him from his original place of employment when such transfer is not based on an adequate, valid reason dictated by work requirements, or is such as to cause serious prejudice to the employee. In such case the employer shall also be ordered to return the employee to his original place of employment and to pay his wage arrears from the date of his dismissal to the date of his reinstatement, and to consider his services as continuous.

The employee's right to apply for a stay of execution of the decision to dismiss him shall lapse if he fails to submit his application within the prescribed period of fifteen days, without prejudice to his right to claim his other statutory rights within the one-year period prescribed in section 13 of this Code.

Article 91

In addition to the obligations provided for in this Code and in the rules and decisions issued for its implementation, the employer shall:

(a) treat his employees with due respect and refrain from any word or act that may affect their dignity or religion;